PP

v.

CHUA SENG HUAT

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[CRIMINAL APPEAL NO: 42-13-98-I]
8 JUNE 1999

SECURITIES: *Insider trading - Sale of company shares - Whether managing director acted in "official capacity" - Whether having prior knowledge of decline in profits of company - Whether having possession of company's accounts - Securities Industry Act 1983, s. 90*

SECURITIES: *Insider trading - Sale of company shares - Specific confidential information - Whether company's accounts relied on constituted "specific confidential information" - Whether there was "improper use" of information - Whether there was any advantage gained - Whether confidential information a factor in decision to sell shares - Securities Industry Act 1983, s. 89*

SECURITIES: *Insider trading - Sale of company shares - Knowledge of decline in profits of company - Whether information materially affecting price of shares - Test applicable - "Reasonable investor" test - Distinction between improper use of position and improper use of information*

EVIDENCE: *Burden of proof - Insider trading - Charges under ss. 89 & 90 Securities Industry Act 1983 - Whether charges proved beyond reasonable doubt - Failure to challenge evidence of defence witness - Effect*

EVIDENCE: *Burden of proof - Insider trading - Charges under ss. 89 and 90 Securities Industry Act 1983 - Prosecution proving existence of price-sensitive information and sale of shares - Whether burden shifted to defence - Whether accused to disprove improper use of information - Evidence Act 1950, s. 106*

This was an appeal by the Public Prosecutor against the acquittal of the respondent against charges under s. 90 of the Securities Industry Act 1983 ('the Act') and alternative charges under s. 89 of the Act. The charges related to two sales of shares of Kim Hin Industries Berhad ('KHI'), a public listed company, belonging to Kim Hin Malaysia Sdn Bhd ('KHM') on 23 May 1995 and 26 June 1995 respectively. It was alleged that at the time of the sales, the respondent, who was managing director of both KHI and KHM, had specific confidential information of "the decline in operating profits of the Kim Hin Group of companies" of which he was also the managing director.

According to the evidence, KHM owned 48.69% of KHI in 1995 and KHI had nine subsidiaries, six of which were wholly owned by it, including Ceramica Indah Sdn Bhd ('Ceramica') and Kimgress Marketing Sdn Bhd ('Kimgress'). In order to prove the ingredients of the offences *ie*, that there was a decline in the operating profits of the companies, the prosecution submitted the January to December 1994 and the January to June 1995 Cumulative Operating Profits and Loss accounts derived from the monthly management accounts for KHI, Ceramica and Kimgress.

The respondent objected to the accounts, contending that the selection did not reflect the true earnings of the group since the other companies were excluded. He argued that the January to April 1995 accounts carried inaccurate stock figures due to a change in the computer system and mistakes in the keying in of the figures resulting in a substantial understatement of the real profit figures. Further, as the management accounts were handed to the respondent by the accountant, Foo Siew Lin ('Foo'), in the month subsequent to the month to which the management account related, it was contended that the respondent could not have seen the April 1995 account before 23 May and the May 1995 account before 26 June. On the issue of whether the information was specific confidential information, it was contended by the respondent that such information must deal with the revenue position of a company where the future solvency of the company was in question. In addition, the respondent stated that he had been authorised to sell the shares in KHI by a resolution dated 8 June 1994.

Held:

[1] The word "official" would include the tenure of duties of an officer of a company like KHI or KHM. This is more so when the term "Any person" in s. 90 of the Act is used, as it shows an intention of the legislature to cover all persons, government or public officers or officers of a public or private company. This being the case, the acquittal of the respondent merely on the ground that s. 90 did not apply to him was wrong.

[2] The accounts of the three companies were rightly chosen as the other subsidiaries' contributions were insignificant compared to the three and the performance of Ceramica could rightly be said to be the barometer of the group.

[3] That the information disclosed by the management accounts was confidential cannot be disputed as it would benefit rivals in similar business since it gives details of the operating costs, the sales volume and profit margin. There is no suggestion that investors knew about the decline in profits before the preparation of those accounts; the information, therefore, remained confidential.

[3a] The management accounts of January to April 1995 speak unequivocally for themselves and would convey the definite information that there was a decline in profit. All the matters relied on by the defence as making those accounts inaccurate or unreliable, could not prevent the information from being specific information. Since the information could be "specific information", it followed that it qualified more so as "information" under s. 90.

[3b] The decline in profit if continued over time would surely mire the company in financial crises and lead to insolvency. Therefore, the decline in profit dealt with the revenue position of a company.

[4] The statement of the respondent that he read the accounts every month reinforced the prosecution's case that the respondent on 23 May had the accounts of January to April 1995. Even though there was no evidence of the respondent having read them, it could be inferred that he must have read them since they were prepared for his consumption and to enable him to take actions or make decision. Therefore, even without the statement, there was enough evidence to show that he had those accounts and had read them.

[4a] When Foo was examined-in-chief, she was not asked at all as to when she handed the May 1995 management account to the respondent. Given this failure, it was not open for the prosecution to submit at the end of its case that Foo's evidence that the May 1995 management account could not have been given to the respondent before 26 June was incredulous. Therefore, the lower Court was left with no option but to accept the evidence which the prosecution did not challenge by invoking s. 143(2) or s. 154 of the Evidence Act 1950.

[5] A "reasonable investor" is a person who possesses general professional knowledge as opposed to the daily retailer out to make a quick profit or a person who has made specific researches. This investor must possess the ability to do technical analysis and fundamental analysis on information that are freely available.

[6] The lower court had looked at the information conveyed by the January to April 1995 management accounts from the respondent's viewpoint rather than that of a reasonable investor who possessed general professional knowledge. Therefore, the question of materiality had been looked at subjectively which was a misdirection by the lower court.

[6a] The relevant figures showed a decline of RM9.4 million in profit which meant that there had to be evidence to suggest a turn around involving more than RM9.4 million; there was absolutely no evidence to remotely support such a probability. Therefore the probability existed that there would be an unexpected or drastic decline in the operating profits of the KHI group of companies as indicated in the management accounts which any reasonable investor would know by reading the said accounts. The test of materiality had therefore been satisfied.

[7] The prosecution must, in addition to establishing the ingredients of the specific confidential information which if generally known to the public would materially affect the price of the shares, also establish that the information was a factor which resulted in the respondent's decision to sell the shares. Since there was no direct evidence of this, the circumstances surrounding the sale of the shares will have to be considered.

[8] The sales in the present case were done more than eleven and twelve months respectively of the resolution of 8 June 1994. This meant that the sale of shares was not dictated by the urgency to raise money as stated in the resolution but by some other reason. That the two sales came so soon after it became apparent to the respondent that KHI group of companies would suffer a significant decline in operating profits justifies the inference that it was for that reason that the sales were made. The case was made stronger by the use of his personal assistant's name to trade the shares and by the rapid and numerous sales thereafter and just before the official announcement of the financial results on 23 September which brought about the plunge in the price of the shares.

[9] "Improper use of position" depended upon whether there was a breach of standard of conduct that would be expected of a person in a similar position. "Improper use of information" under ss. 89 and 90 of the Act, on the other hand, depended not on what managing directors in a similar position would do but on whether such use was prohibited by law. In the present case, the prosecution had proven beyond reasonable doubt that there was improper use of the price-sensitive information by the respondent.

[10] If the two sales of shares had taken place after the release of the financial results of 26 September, the price fetched would be around RM6.70 instead of RM11.10 and RM11.41 respectively which were the prices which the two sales fetched. Therefore, there was clearly an advantage gained.

[Appeal allowed; acquittal set-aside.]

Case(s) referred to:
Basic v. Levinson 485 US 224 1988 ***(foll)***
Caswell v. Powell Duffryn Associated Collieries Ltd [1940] AC 152 ***(refd)***
CCA v. Green [1978] VR 505 ***(refd)***
Chew v. R [1992] 7 ACSR 481 ***(refd)***
Dahyabhai v. R, A [1964] SC 1563 ***(refd)***
Green v. Charterhouse Group Canada Ltd et al 68 DLR (3rd) 592 ***(foll)***
Martin v. Osborne [1936] 55 CLR 367 ***(refd)***
PP v. Chodhury [1981] 1 MLJ 6 ***(foll)***
PP v. Heng You Nang [1949] MLJ 285 ***(refd)***
R v. Byrnes [1995] 17 ACSR 551 ***(refd)***
R v. Towey [1996] 21 ACSR 46 ***(refd)***
R v. Yuill [1994] ACSR 95 ***(refd)***
Ryan v. Triguboff [1976] 1 NSWLR 588 ***(refd)***
SEC v. Texas Gulf Sulphur Co 401 F 2d 833 1968 ***(refd)***
United States v. O'Hagan [1997] WL 345229 10 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 132A, 132B
Evidence Act 1950, ss. 106, 142, 143(2), 154
Securities Industry Act 1983, ss. 89(1), 90

Companies Act [Aust], s. 229(4)
Companies Act (Cap 185) [Sing], s. 132A(1)
Securities Act 1966 [Ont], s. 113(1)

Other source(s) referred to:
Concise Oxford Dictionary

For the appellant - K Muniandy (Foo Lee Mei & Neetasha Rauf with him)
For the respondent - Robert Richter QC (Kho Lik Kiat & Richard Poh with him)

Reported by Cindy Chan

JUDGMENT

Ian HC Chin J:

Introduction

On 11 April 1998 Chua Seng Huat ("Chua"), the accused in the court below, was acquitted of two principal charges under s. 90 and of two alternative charges under s. 89 of the Securities Industry Act 1983 ("the Act"), without his defence being called. The Public Prosecutor appeals against the acquittal. The charges concern two sales of shares of Kim Hin Industries Berhad ("KHI"), a Kuala Lumpur Stock Exchange listed company. One sale was of 1,000,000 shares on 23 May 1995 and the other of 200,000 shares on 26 June 1995 and the shares belonged to Kim Hin Malaysia Sdn Bhd ("KHM"). It is alleged that at the respective time of the two sales Chua had information of

"the decline in operating profits of the Kim Hin Group of companies" of which he is the managing director. Chua is also the managing director of KHM.

Since the lower court is of the view that a case beyond all reasonable doubt had not been made out at the close of the case for the prosecution, it is necessary to set out the facts of the case relevant for considering whether the ingredients of the offences had been established. Before turning to that question I will first decide whether Chua, as managing director, can be considered as acting in an "official capacity" within the meaning of s. 90 when he sold those shares and that turns upon the meaning to be ascribed to the phrase "official capacity".

What Is "Official Capacity"

The defence contended, and the lower court agreed, that s. 90 covers only persons who are or were government or public service officers and not managing or other directors of public listed companies. This is the convenient place to reproduce both s. 89 and s. 90 for the purposes of construing the meaning of the term "official capacity", *viz.*:

Dealings by officers in securities

89(1) An officer, agent or employee of a corporation or officer of a stock exchange who is or in relation to a dealing in securities of the corporation by himself or any other person makes improper use to gain, directly or indirectly, an advantage for himself or any other person of specific confidential information acquired by virtue of his position as such officer, agent or employee or officer of the stock exchange which if generally known might reasonably be expected to affect materially the price of the subject matter of the dealing on a stock exchange shall, in addition to any penalty imposed under section 91, be liable to a person for loss suffered by the person by reason of the payment by him or to him of a consideration in respect of the securities greater or lesser, as the case may be, than the consideration that would have been reasonable if the information had been generally known at the time of the dealing.

(2) An officer, agent or employee of a corporation or officer of a stock exchange shall not be liable under subsection (1) to a person for any loss suffered by that person if that person knew or ought reasonably to have known of the information referred to in subsection (1) before entering into the transaction relating to the dealing in securities of the corporation.

(3) An action for the recovery of the amount of a loss referred to in subsection (1) shall not be commenced after the expiration of two years after the date of the completion of the dealing in securities in respect of which the loss was suffered.

(4) In this section –

"agent" includes a banker, advocate and solicitor, auditor, accountant or stock broker of the corporation and any person who is or at any time in the preceding six months has been knowingly connected with the body corporate and has information which:

(a) the holds by virtue of being connected with the corporation;

(b) it would be reasonable to expect a person so connected and in the position by virtue he is so connected not to disclose except for the proper performance of the functions attaching to that position; and

(c) he knows is unpublished price-sensitive information in relation to the securities of the corporation.

"officer" includes a person who at any time within the preceding twelve months was an officer of the corporation.

(5) This section shall be extended to apply to an officer, agent or employee of a corporation or officer of the stock exchange who makes improper use to gain, directly or indirectly, an advantage for himself or any other person, by means of specific confidential information acquired by virtue of his position as such officer, agent or employee of the corporation or officer of the stock exchange, regarding:

(a) the possibility of a take-over or bid being made to another corporation by the corporation to which he belongs; or

(b) the possibility of his corporation entering into a substantial commercial transaction with another corporation,

to deal in the securities of that corporation in the expectation that, if this information becomes generally known the price of the securities of that other corporation on a stock exchange might be materially affected.

Prohibition on abuse of information obtained in official capacity

90. Any person, who is or in relation to dealing in securities of a corporation, has any information which if generally known might reasonably be expected to affect materially the price of the subject matter of the dealing on a stock exchange and which:

(a) he holds by virtue of his official capacity or former official capacity;

(b) it would be reasonable to expect a person in his official capacity or former official capacity not to disclose except for the proper performance of the functions attaching to that official capacity; and

(c) he knows is unpublished price-sensitive information in relation to securities of the corporation,

shall not make improper use of such information to gain, directly or indirectly, an advantage for himself or for any other person and any person who contravenes or fails to comply with the provisions of this section commits an offence.

Three years after the Act came into force, similar provisions, but not exactly worded, were introduced in the Companies Act 1965 in the form of s. 132A and s. 132B. Every word of s. 89 had been reproduced in s. 132A save for the replacement of verb "is" with the preposition "in" and the insertion of definitions and the provision of penalty, *viz*.:

132A. (1) ... who **in** or in relation to a dealing

(2)

(3) **Notwithstanding the provisions of the Limitation Act 1953,**

(4)

"corporation" includes a corporation that is related to a corporation under section 6.

"dealing in securities in relations to a corporation" means a transaction relating to –

(a) shares in or debentures of the corporation or interests within the meaning of section 84 made available by the corporation or by a related corporation; or

(b) rights or options in respect of the acquisition or disposal of such shares, debentures or interests;

(5) ...

(6) An officer or agent or employee of a corporation or officer of the Stock Exchange who commits a breach of the provisions of this section shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or thirty thousand ringgit or both.

All the additional provisions in s. 132A do not make that section any different from s. 89. As for the preposition "in" in s. 132A instead of the verb "is", I am of the view that it was for the purpose of correcting an obvious error in s. 89 where the employment of the verb "is" makes the sentence in s. 89(1)

structurally wrong. Therefore, the verb "is" in s. 89(1) should read "in". The penalty for an infraction of s. 89, a fine of less than one million ringgit and to imprisonment of not more than ten years, is much higher than that for s. 132A which provides for a penalty of imprisonment of five years or fine of thirty thousand ringgit or both. Section 132B is worded exactly the same way as s. 90 save again for the verb "is" in s. 90 which is replaced by the preposition "in" in s. 132B. Here too, it is my view that s. 90 should be read with "is" substituted by "in". Why, then, are s. 132A and s. 135B necessary when you already have s. 89 and 90? I cannot find any reason for it and their existence only gives rise to an undesirable situation where exact provisions cover the same kind of offence but with one provision providing for a much lighter penalty.

Before the insertions of the two sections in the Companies Act only s. 132 of the Companies Act dealt with matters resembling those dealt with by s. 132A and s. 132 only covered officer, agent or employee of the company. This was amended at the same time as the two sections were inserted to, among other things, cover officer of the Stock Exchange and to provide for "improper use" as against mere "use". It suffices for me to merely mention that s. 132 and s. 132A cover the same group of persons but s. 132 is only concerned with "any information" while s. 132A with not only "specific confidential information" but price-sensitive information as well, that is information that "affect materially the price" of the shares. Section 132B deals with "any information" which is price-sensitive but it covers "any person". It would appear that s. 132, s. 132A and s. 132B provide for three different types of offence. The term "Any person" in s. 90 without more would apply to persons of whatever occupation, be it in the public or the private sector. That term must be given its ordinary and natural meaning. It remains to be examined whether that meaning has been qualified or changed by the subsequent use of the term "official capacity". The *Concise Oxford Dictionary* defines the word "official" as meaning: "of or relating to an office or its tenure of duties; characteristic of officials and bureaucracy; a person engaged in official duties". That definition would include the tenure of duties of an officer of a company like KHI or KHM. That it speaks of officials and bureaucracy and also of office or its tenure of duties only shows how wide the term "official" is. This is even more so when the term "any person" is used which, in my view, shows an intention of the legislature to cover all persons, government or public officers or officers of a public or private company. Therefore, the acquittal of Chua merely on the ground that s. 90 does not apply to him is wrong.

Facts Of Case

One matter that is required to be proved for both offences under s. 89 and s. 90, is "the decline in operating profits of the Kim Hin Group of Companies" which I will deal with first by going through the evidence relating to this question.

Whether The Accounts Show A Decline In The Operating Profits Of Kim Hin Group Of Companies

In 1995 KHM owned 48.69 % of the shares of KHI. KHI has as its subsidiaries the following nine companies: (1) Ceramica Indah Sdn Bhd ("Ceramica"), (2) Kim Hin Properties Sdn Bhd, (3) Kimgress Marketing Sdn Bhd ("Kimgress"), (4) Kim Hin Ceramic (Seremban) Sdn Bhd, (5) Refined Kaolin Sdn Bhd, (6) Kim Hin (Shanghai) Building Material Co Ltd., (7) Kim Hin Ceramic (Shanghai) Co. Ltd (8) Miyama Ceramics Sdn Bhd and (9) Guolene Paper Products (Kuching) Sdn Bhd. KHI owned 100% of the company (1) to (6) and respectively 70%, 34% and 50% of the company (7), (8) and (9). Ceramica has a 50% interest in two Australian companies. Both KHI and KHM had, at the relevant time, Chua as its managing director.

The January to December 1994 and the January 1995 to June 1995 Cumulative Operating Profit and Loss figures of only three of the said companies, namely, KHI, Ceramica and Kimgress, were produced, which selection gave rise to the argument that they do not reflect the earnings of the group since the other companies were not included, which contention I will deal with later. These accounts were prepared by Foo Siew Lin ("Foo"), the accountant for these three companies. The figures of these accounts were derived from the monthly management accounts ("management accounts") for the said months and they were handed to Chua or left on his desk by Foo in the month subsequent to the month to which management account related or even later, for example, the January 1995 account dated 8 March 1995 was only given to Chua in March 1995. Though the management accounts for February 1995 to June 1995 bear the respective dates of 29 March, 26 April, 11 May, 16 June and 21 July, it is contended by the defence that the April 1995 account may not have been seen by Chua before 23 May and also that the May 1995 account may not have been seen by Chua before 26 June, that is, before the two respective dates of sale of the shares for which Chua is charged. Again, this point will be dealt with later. From those management accounts of KHI, Ceramica and Kimgress, the following statistics are culled:

Month	1994 profit	1995 profit/loss	Decline in profit
January	3,587,597.59	-1,303,014.37	-136.32%
February	5,570,546.66	-1,503,683.93	-126.99%
March	9,525,956.66	-119,927.40	-101.262%
April	12,551,514.12	2,731,774.68	-78.242%
May	15,888,488.26	8,008,075.99	-49.60%
June	18,365,880.80	8,967,487.95	-51.17%

As to why only the accounts of three companies were chosen, the prosecution contended, rightly I would add, that the other subsidiaries contributions were insignificant compared to those of the three companies and this can be seen from the following tables worked out from the accounts showing the contribution of each company:

Name of Companies	6 months ending 30 June 1994	Year ending 31 Dec 1994	6 months ending 30 June 1995
Ceramica	96.45%	89.13%	126.83%
KHI	0.84%	2.19%	-24.75%
Kimgress	-0.31%	2.35%	-4.76%
Company (3)	-0.63%	-0.28%	0.62%
Company (5)	0%	0%	0%
Company (6)	0.57%	0.21%	0%
Company (7)	0%	-7.38%	-0.58%
Company (4)	N/A	-2.37%	3.88%

The performance of Ceramica can rightly be said to be the barometer of the group as was the opinion of Ch'ng Boon Huat, a certified and chartered accountant and also a corporate analyst when he was testifying. There is no evidence nor was it suggested that the profits or losses of the said two Australian companies played any significant role and we can safely disregard them.

The management accounts will, putting aside the question of their accuracy and the time Chua received them, show the profit of the three companies in any of the months January to June 1995 to anyone reading them. However,

the opening statement of the prosecution created controversy when they undertook to prove the information that "the Kim Hin group of companies were suffering from a decline in operating profits for the interim period ending 30 June 1995" which may convey the impression that the management account of June 1995 is relevant. It will be recalled that the charges did not mention the term "interim period ending 30 June 1995" at all. If it was meant to prove that the accused had the information of the declining profit for the period including or ending in June 1995 as conveyed by that account, the prosecution's case, as rightly contended by the defence, would be unsustainable as the prosecution's evidence viewed at its best would show that Chua only had that account and information by the earliest in July 1995 which was after the date of the sales of the shares, which were in the months of May and June, and, therefore, that information could not have any part to play in the decision to sell the shares. However, the words "for the interim period ending 30 June 1995" cannot be construed to mean only the financial position at the month of June 1995. That phrase means the financial position at any of those months, that is January, February, March, April, May 1995 and leading to June 1995. This is further made clear by the use of the term "decline in profit" in the charge which, in order to establish whether there is such, necessarily means looking at and comparing the various figures from month to month of 1995 or month on month of 1994 with 1995. Whatever it is, the court, in a clear case, ought to amend the charge to fit the proved facts (*PP v. Heng You Nang* [1949] MLJ 285). In this case, the charges as they stand do not require any amendment as they did not restrict the information to any particular month and it cannot be so restricted. The decline can be reckoned by reference to any of the months from January 1995 to June 1995 and by comparing one month with the previous month in the same year or by comparing month on month for the years 1994 and 1995 and the defence knew that by the mere use of the phrase "decline in profit" in the charges because whether there is a decline or not can only be measured by comparing the operating profit of one period with that of another. The prosecution's case is that the decline is shown by comparing the figures of any of the months from January to June 1995 with the corresponding months of 1994. There can be no question of the defence being misled; a *fortiori* when the charges mentioned the transaction dates of 23 May and 26 June 1995. So, nothing turns on the opening statement of the prosecution nor the manner in which the charges were drafted.

Returning now to the accounts, it can clearly be seen from the figures that have been set out in the tables earlier, that there is a decline in the profit of the Kim Hin Group of Companies on the month on month basis when the figures of 1995 are compared with those of 1994 though there is a gradual lessening of the decline (comparing one month with the previous month) from January 1995 to May 1995. The question of accuracy is not relevant for

determining whether those accounts, taking them as they are, show a decline in profit and they do show a decline in profit. It remains to be examined whether it matters when the other ingredients of the offence are considered. Since the subject of the accounts is discussed here, I will complete the narrative here concerning the accounts.

The defence contended (1) the January to April 1995 accounts do not carry accurate stock figure with the result that the profit cannot be ascertained, (2) there was a production expansion program which resulted in an increase in the turnover for the year of 1995 when compared to 1994 and this would increase the stock, (3) Chua had considerable expectations of contributions from companies in Seremban and Shanghai (company (4) and (7)), which should have been taken into account in computing the profit and the failure to do so renders the picture incomplete and inaccurate though he did not have the figures and (4) there was no physical stock check.

The evidence shows that the closing stock figures for the months January to April 1995 were just estimates but the figures fell back on the reliable closing stock figure for December 1994. The figures had to be fed into the computer again due to a change in the computer system and there were mistakes in the keying in of the figures which resulted in inaccurate closing stock figures in the months following December 1994. The April monthly management account stated the closing stock figure to be RM16,803,100.80 which was more or less the same with the March figure of RM18,803,746.20, the February figure of RM16,807,423.54 and the January figure of RM16,919,524.97. The figure shot up to RM23,294,129.52 for the May monthly account after the correct stock figure was ascertained. The lack of a correct stock figure, according to Foo, has the result of understating the profit by RM6.6 million if the April 1995 account is looked at. This witness agreed with the defence suggestion that Chua would "be justified in saying the figure from January-April should have been a lot higher". She also agreed to the defence suggestion that Chua when he looked at the May management account would "be justified in saying that the real profit figures are still substantially understated".

Kevin How (PW25) had testified that the computer of KHI for the first half of 1995 did not generate stock figure which is necessary for an accurate reckoning of the gross profit figure. He also testified that if there is a gross understatement of the closing stock that would have a huge impact not only on the profit figure but also on the stock turnover, current assets ratio and liquidity ratio. For Kim Hin Group of Companies, according to this witness, the closing stock formed a substantial part of the current and total asset. He testified that unless you know what the closing stock figure is you would not be able to work out the gross profit margin. He said that for the first half of

1995 when the stock figure is not known one would have to rely on the historical gross profit margin of the same period in the previous year. In this regard, the margin for the period ended June 1994 is 50.12% and that it would be reasonable for Chua in the middle of 1995 to work on the basis of the margin if he did not know the closing stock figure. On the assumption that there is "no proper stock closing figure available" and using the historical profit margin of 50%, the gross profit margin for the January 1995 account should be RM3.6 million (approximately 50% of the sales of RM7,192,288.13) and not the sum of RM891,574.27 stated there. According to this witness, if Chua acted on the historical profit margin it would be reasonable for Chua to say that the gross profit margin for the various periods should be:

January	RM3.6 m (instead of RM891,574.27)
February	RM7.599 m (instead of RM2,529,860.17)
March	RM12.6 m (instead of RM5.963 m)
April	RM18.2 m (instead of RM10.314 m)

Ch'ng Boon Huat (PW27) testified that the April account is not reflective of the financial position of the company. More of the evidence of this witness will be referred to later as well as that of the expert Neoh Soon Kean (PW29) ("Neoh") when I deal with the effect of the inaccuracies of the January to April 1995 management accounts. From what I have stated, it is possible to conclude that the monthly statement of accounts for the months January to April 1995 are not accurate in view of the fact that there is no accurate stock figure. This is the convenient place to pause in the narrative so as to consider the question of whether the information conveyed by those management accounts can be regarded as "specific" within the meaning of s. 89, in view of the inaccuracies that came about from a the want of an accurate stock figure for the January to April 1995 management accounts.

Whether Such Information Was "Specific Confidential Information"

In so far as the information is confidential it cannot be disputed. Apart from the evidence of Foo who testified that the monthly management accounts were confidential and not disseminated generally within the company, it is obvious that the information of the kind disclosed by the management accounts would benefit rivals in similar business since it gives details of the operating costs, the sales volume and profit margin, which would enable the rivals to know how competitive the company is and then to devise strategy to compete with it; such information must surely be kept confidential. However, the fact that the circulation of those accounts is restricted does not per se make those documents and information derived therefrom confidential if the information

is already known to the general public or investors through prior disclosures, say, for example through a well publicised court case involving the company where the possibility of an imminent decline in the profit was discussed and revealed. However, there is no suggestion in this case that the general body of investors knew about the decline in profit before the preparation of those accounts; the information, therefore, remained confidential. This leads me to the question of whether the information is specific. It will be recalled that the management accounts for the months of January to April 1995 are inaccurate because the closing stock figures were not available. This is beyond dispute as the witnesses for the prosecution whom I have mentioned earlier said so. Mr. Richter QC for the defence argued that the specific confidential information must deal with the "revenue positions of a company deal with situations where the future solvency of the company is in question or where there is a financial crisis which threatens the existence of the company which is not the case here". Mr. Richter QC continued:

> There are no cases that hold that a single piece of information taken out of the context which gives it meaning can be said to constitute "specific confidential information". For example, it is not possible to take the following specific information in a memo which says: "the shipment of gold will arrive on 30 June but this information is not to be taken seriously since we know it to be wrong" and to extract from it the words "the shipment of gold will arrive on 30 June" and put that forward as the specific confidential information alleged in a case which depends on showing that an accused acted on "specific confidential information".

The example given there deals with a totally false information while the present case deals with inaccurate but not totally false information and, therefore, I cannot see how the defence can draw comfort from such an example or to find support from it for their argument. In so far as the contention that the information must concern the revenue positions of the company, the decline in profit if continued over time would surely mire the company in financial crisis and lead to insolvency. Therefore, the decline in profit deals with the revenue position of a company. Mr. Richter QC when arguing that the information in this case is not specific had referred to *Ryan v. Triguboff* [1976] 1 NSWLR 588, 596, where the court there said:

> "Specific information", in my view, connotes not merely that it is precisely definable, but that its entire content can be precisely and unequivocally expressed and discerned.

The specific information in that case was alleged to be this – "that Dominance N.L. was prepared to purchase a large parcel of shares in Kimberley being 44% of all issued shares so as to give effective control of the company at a

price of 10 cents per share at a time when they were being quoted on the Stock Exchange at 4 cents per share." The court there held that the expression "that Dominance N.L. was prepared to purchase" is a conclusion drawn from other facts which involved knowing specific details of the transactions in which the representatives of Dominance N.L. and the defendant were both interested, the former in purchasing and the latter in selling and who had entered into negotiations in sale and purchase of the shares. It was held that "the conclusion by the defendant, or anyone else knowing those facts at that time, that Dominance N.L., through the persons representing it, was "interested" in the purchase of the shares of the defendant and his co-directors or "was indicating a willingness" to purchase them or "was prepared to negotiate" to buy them or "might buy them" are "merely loose descriptions which can be applied to the apparent state or attitude of mind to the proposed transaction of those acting for Dominance N.L., arising from the fact that they were participating in the negotiations". The court also held that the specific detail of the matters under discussion and the fact that Dominance N.L., through its representatives, was participating in those discussions, gave rise at the time to some general conclusions which had been erroneously treated as "specific information". It was also held that the so called fact – "the fact that Dominance N.L. was prepared to purchase a large parcel of shares in Kimberley being 44% of all issued shares so as to give effective control of the company at a price of 10 cents per share at a time when they were being quoted on the Stock Exchange at 4 cents per share" – was only a deduction and cannot be specific information since it was not capable of being pointed to, identified or expressed unequivocally. That case was considered in the Singapore case of *PP v. Chodhury* [1981] 1 MLJ 6 where in answer to certain questions referred to it concerning the offence of insider trading the Court of Criminal Appeal, among others, said these:

(1) it was a question of fact in each case to be resolved on the evidence adduced at the hearing of the case as to what is "specific confidential information";

(2) "information" as used in the section, meant knowledge of a particular event or situation such as advice, communication, intelligence, news, notification and the like;

(3) the knowledge which the respondent had of the then financial situation of the company was specific information within the meaning of s. 132A of the Companies Act. It was a kind of specific information anyone familiar with the market knows that could markedly affect the prices of the particular shares and could result in the suspension of the trading of the shares on the Stock Exchange;

That case concerns the words of s. 132A(1) of the Singapore Companies Act (Cap 185) which are similar to our s. 132A(1) and the information that was held to be specific was this: "Beneficial & Co. Ltd had sustained heavy losses for the year ending 29 February 1976". In giving those answers the court considered the Australian case of *Ryan v. Triguboff, supra,* and commented that the judge in that case had made general observations of the findings of facts without declaring the meaning of "specific information" when the judge in the Australian case said: "The 'specific information' to which the section refers must have an existence of its own….must be capable of being expressed unequivocally."

The Singapore court also considered and followed the Canadian case of *Green v. Charterhouse Group Canada Ltd* et. al. 68 D.L.R. (3d) 592. That case involved the interpretation of s. 113(1) of the Securities Act 1966 (Ont) which reads:

> 113.(1) Every insider of a corporation or associate or affiliate of such insider, who, in connection with a transaction relating to the capital securities of the corporation, makes use of any specific confidential information for his own benefit or advantage that, if generally known, might reasonably be expected to affect materially the value of such securities, is liable to compensate any person or company for any direct loss suffered by such person or company as a result of such transaction, unless such information was known or ought reasonably to have been known to such person or company at the time of such transaction, and is also accountable to the corporation for any direct benefit or advantage received or receivable by such insider, associate or affiliate, as the case may be, as a result of such transaction.

There the Ontario Court of Appeal with regard to the phrase "specific confidential information" said this:

> ...Taking the case of Godbout, who obviously had more information that anyone else, it is my view that the information he had on 30 April 1968, as to the first quarter earnings, and as to the state of the negotiations with Neon was in each case "specific". (Since Mr. Weir does not rely on Godbout's knowledge of the Harding discussions, it is not necessary to characterize that information.)
>
> The facts Godbout had concerning Neon might have been unbelievable to other directors, or the proposals which were being made to him might have been totally unacceptable to them or some of them. The information may not have been worthy of credence or of sufficient weight to justify any positive action by the board of Imbrex. Nevertheless, in my view the information was "specific"; the word is used by the section in contradistinction to "general", or "not specific".

It is clear from that passage that even non-credit worthy information can still be specific information. This means even inaccurate information can still be specific information.

For my part, I am inclined to follow *PP v. Chodhury* and *Green v. Charterhouse Group Canada Ltd* as regards what constitutes specific information rather than *Ryan v. Triguboff*. The management accounts of January to April 1995 speak unequivocally for themselves and no deduction is necessary. They express the profits or losses made and the figures, when compared with the figures of the corresponding period of 1994, would convey the definite information that there is a decline in profit. Of course, calculations or deductions will have to be made in order to ascertain whether there is a decline and the extent of the decline and this involves comparing the accounts of 1994 with 1995 and, therefore, gathering information from more than one source. Such a process should not prevent the information from being specific. This means all the matters, which I have earlier set out, relied on by the defence as making those accounts inaccurate or unreliable, cannot prevent the information from being specific information *(Green v. Charterhouse Group Canada Ltd).* The information though inaccurate is not "unusable" as contended by Mr. Richter because if it was of no use I do not see any reason and none was proffered why those accounts were still being churned out month after month from January to April 1995. The inaccuracy of the accounts goes only towards the consideration of whether Chua could have made use of the information inaccurate as it may be. Since the information can be "specific information", it follows that it qualifies more so as "information" under s. 90 because information "need not be specific information or factual knowledge of a concrete kind but may include information obtained by means of a hint or a veiled suggestion" (*CCA v. Green* [1978] VR 505).

There is no dispute that Chua acquired the information by virtue of his position as the managing director and this fact is too plain to admit of any argument to the contrary. I turn now to the question of when Chua acquired the information.

When Did Chua Have Those Accounts Showing The Decline In Profit

I have already adverted to the evidence with regard to the accounts being placed on the desk of Chua for his perusal. All these accounts, except for January 1995, were placed before Chua in the month subsequent to that to which the account related. The January 1995 account could only have been placed before Chua in March 1995 since that account was only generated by the computer in March. Foo Siew Lin testified that she personally handed over the January to April 1995 monthly management accounts to Chua. I do not see any doubt at all in this aspect. Neither is it, contrary to what the defence contended, unclear about this aspect of the case. The statement of Chua, which

was adduced as evidence at the insistence of the defence, was relied on as casting a doubt here and this is what Mr. Richter QC said with regard to this statement, *viz*.:

> A. AS AT MAY 1995 WHEN THE FIRST CHARGED SALE OCCURRED, ALL THE ACCUSED COULD HAVE HAD WOULD HAVE BEEN THE APRIL ACCOUNTS FOR THE KUCHING COMPANIES. THIS IS NOT ENTIRELY CLEAR FROM THE EVIDENCE BECAUSE IT IS POSSSIBLE THAT HE MIGHT ONLY HAVE HAD THE MARCH 1995 MANAGEMENT ACCOUNTS. IN HIS STATEMENT – Ex D30 – he answers that he read the accounts each month. It is thus possible that he read the March accounts between the 23 May and the end of May 1995 i.e. after 23 May 1995. Given that this is a criminal case and that the accused must be given the benefit of every reasonable doubt, it is submitted that the prosecution has even failed to demonstrate that on 23 May the accused had more than the March accounts.

I am unable to see, given the evidence which I have earlier referred to, how the statement of Chua that he read the accounts every month could be said to cast doubt as to whether he had on 23 May already read the accounts of April 1995 as well as those of the preceding months. That contention is just too fanciful to merit consideration let alone raising doubt on the evidence that the accounts were hand delivered or left at his table after they were generated by the computer and printed out and this was normally done in the month subsequent to the month of the accounts except, as mentioned earlier, the January 1995 account which was only given to Chua in March 1995. If anything, the statement of Chua serves to reinforce the prosecution's case that Chua on 23 May had the accounts of January to April 1995. Even though there is no evidence of Chua having been seen reading them it can be inferred that he must have read them since they were prepared for his consumption and to enable him to take actions or make decisions. Therefore, even without Chua's statement there is enough evidence to show that he had those accounts and had read them. I turn now to the May 1995 account upon which 26 June sale charge rested and which the prosecution must prove beyond any reasonable doubt that the May 1995 account was handed to Chua before 26 June sale was conducted.

As mentioned earlier, the May 1995 account bears the date of 16 June which date can safely be regarded as the date in which the account was printed out. Foo was not asked as to when she handed this account to Chua. Her evidence in this respect reads:

> In 1995 I delivered this report to Johnnie Chua. I could have hand delivered to him or put on his table upon his instruction. I received back Ex. 208 (the May 1995 management account) subsequently. I can't remember how I received it back.

Her other evidence revealed that she normally would hand over the management account in the second week or towards the end of the month subsequent to the month to which the management account relates. When cross-examined, she referred to a Financial Analysis Report for May 1995 which she said was sent together with the May management account to Chua but she cannot tell when. It was the first time she had produced such report. She then told the court that she had this Financial Analysis Report in the office and offered to produce it, which the court agreed. It was then obtained and produced. It was an assortment of statements of accounts bearing variously the dates of 22 June, 23 June and 26 June. This witness then went on to say that it took a few days to prepare those documents and that the earliest date she could have put them together is 26 June and that Chua could only have received these documents by the earliest after 26 June. The prosecution did not re-examine her on this point.

Through Richard Tan, an enumerator of the Statistics Department, Kuching, it was revealed that Foo was responsible for signing and submitting correct monthly returns statutorily required by the Statistics Department concerning the production and sales figures, employment, monthly salaries and value of stock owned. He testified that the returns were received in the month subsequent to the month to which the statistics related. Thus, the January to June 1995 returns were received respectively on 27 February, 29 March, 24 April, 22 May, 16 June and 28 July. The prosecution submitted that because the May return was already received by the Statistic Department on 16 June and because the statistics must have been culled from the May 1995 management account, it must be that the May 1995 management account had been delivered to Chua if not on 16 June but shortly after and before 26 June. The prosecution also relied on the evidence of ASP Zakaria bin Hj Mamat, the investigation officer who testified that when he seized documents from Foo, the Financial Analysis Report was not in the file together with the May 1995 and other months' management account while financial reports for the Australian company for the months July to December 1995 were found together with other accounts. The texture of the paper and the font of certain pages of the Financial Analysis Report are different from other pages of the same report. All these, according to the prosecution, show that the Financial Analysis Report was never handed over to Chua and was assembled in the course of the trial.

Mr. Richter QC in the lower court had submitted that the court cannot disregard the evidence of Foo when it was not challenged in the way the law allows and this was elaborated before this court to mean employing s. 142 or s. 154 of the Evidence Act 1950.

The lower court after referring to those matters and circumstances which I have just set out and which it regarded as suspicious and that there was no reason why the May 1995 management account after it was ready on 16 June should not be immediately made available to Chua nevertheless accepted the evidence of Foo that the May 1995 management account could only have been given to Chua after 26 June on the ground that Foo was never challenged by cross-examination.

In so far as the assertion that there is a failure on the part of the prosecution to cross-examine its own witness is based on the assumption that the prosecution is entitled to do so as of right, it is misconceived because there is no such right. However, as pointed out by Mr. Richter, the prosecution can examine its own witness under s. 154 of the Evidence Act 1950, that is, to put any questions to his own witness which might be put in cross-examination by his opponent, that is, to lead as opposed to cross-examine, which the prosecution failed to do. The prosecution could also ask the court to invoke s. 143(2) of the same Act to prohibit leading questions from being put to this witness by the defence if the prosecution felt that Foo had shown "a strong interest or bias in favour of the cross-examining party". Neither of the sections was resorted to by the prosecution and no reasonable excuse could be found for this failure. In fact, when Foo was examined-in-chief, she was not asked at all as to when she handed the May 1995 management account to Chua. Given these failures, it was not open for the prosecution to submit at the end of the case for the prosecution how incredulous Foo was with regard to her evidence that the May 1995 management account could not have been given to Chua before 26 June. The ground work for discrediting Foo was not laid. The prosecution should have questioned Foo to elicit answers to demonstrate how it is incredulous for the May 1995 management account not to have been ready by 16 June when on that date she was able to submit statutory returns to the Statistics Department which details must, *prima facie*, have come from the May 1995 management account. Foo should also have been questioned as to how the account could not have been shown to Chua on June 16 shortly after the account had been printed out on 16 June when past conduct showed otherwise. In my view, unless Foo had been asked all these questions and had given implausible explanations would the lower court be entitled to reject her evidence in that regard while accepting the rest. This is even more so when this witness was paraded by the prosecution as a witness of truth by their calling of her. I am therefore in agreement with the lower court that notwithstanding the suspicion regarding the Financial Analysis Report, the court was left no option but to accept the evidence which the prosecution did not challenge by invoking s. 143(2) or s. 154 of the Evidence Act 1950. I would add that if the witness had been questioned by the prosecution invoking those

sections, the defence would have the opportunity to further cross-examine on the matter in order to elicit evidence that may support the defence assertion that the May 1995 account was not given to Chua until after 26 June (*Dahyabhai v. R, A* [1964] SC 1563). To excuse the prosecution for their failure to resort to those sections while accepting the summation that Foo's evidence with regard to that point is not to be accepted would mean depriving the defence of the right to cross-examine on the matter. Such an event would amount to a miscarriage of justice. This means, because of the failure on the part of the prosecution which I have earlier mentioned, the lower court was left with no alternative but to accept the evidence of Foo that Chua only had the January to April 1995 management accounts when the sale took place on 26 June.

Whether the information if generally known might reasonably be expected to affect materially the price of the shares.

I am in agreement with Mr. Richter QC that another way of stating the issue to be determined as regards materiality is whether the information is "price-sensitive" and unless it is it cannot be said to affect materially the price of the shares. If one prefers the terms of the two sections, I would adopt the test formulated by the Supreme Court of the United States in the case of *Basic v. Levinson* 485 U.S. 224 [1988] which is that materiality "will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in the light of the totality of company activity". Mr. Richter QC contended that the purpose of s. 89 is to secure "market fairness", citing *SEC v. Texas Gulf Sulphur Co.* 401 F.2d 833 (1968). In my view it is more than that and for that one has to take an overview of the Act. The overall objective of the Act is the promotion of honest securities market and the promotion of investor confidence in which the two sections under review play a part. One way of ensuring that objective is through disclosure and the information to be derived from it will be one assurance that there is accurate pricing in the shares. This is so because, and this is the view of Neoh in summary, information about companies with promising or probable future earnings would cause prices of their securities to rise while the market price of securities of companies with less promising earning prospects would decline. The non-disclosure of good news or bad news may prevent accurate pricing because with insider trading on bad news an outside investor might buy a stock which has a lower value than its purchase price while an insider trading on good news might result in an outside investor selling a stock at a price which is below its price following the disclosure; this again is what I can deduce from the very lengthy but useful evidence of Neoh on the subject. Such unfair trading is also what the Act seeks to prevent and in this regard it is correct to say that the two sections are to ensure market

fairness. But it would be more accurate to describe the two sections as being directed against informational inequality which gives rise to an unfair advantage to the insider who has the information over an outside investor who does not have it. Although informational disparity is inevitable in the securities market, investors would hesitate to venture their capital in market where trading based on misappropriated nonpublic information is unchecked by law (*United States v. O'Hagan* [1997] WL 345229, 10 (U.S.)) and that is, in my view, what the Act seeks to prevent. Whether it is material will be looked at objectively from the view of a "reasonable investor" but this begs the question of who is this "reasonable investor". Surely, not a person with all the qualifications and knowledge Neoh had which were derived from specific researches but he still can be one if shorn of those researches he made. On the other hand, it could not be those daily retailers who are out to make a quick profit who generally would not know much and would not bother about the matters or factors which prompt an investor to buy or sell shares and when to do so. In my view that investor should be someone who is in between those two types of persons I have described. He must be, this is the term I would use, an investor who possesses general professional knowledge as opposed to the said daily retailer or a person who has made specific researches.

This investor must possess the ability to analyse and determine the quality and the prospect of the shares which goes towards deciding when to buy. That requires the ability to do technical analysis and fundamental analysis on information that are freely available. He must know that fundamental analysis is the intrinsic valuation of a stock which involves studying financial strength ratio, operating ratio and profitability ratio and which also involves the use of variation measures like price earning ratio, dividend yield and price to book ratio. He is one who knows that technical analysis is concerned with examining the price and volume behaviour of a share. All that comes from the testimony of Neoh which I accept and which qualities I am of the view that a reasonable investor with general professional knowledge must possess. I need not elaborate what all those technical terms are because Neoh had very succinctly explained them at the trial. To add to those qualifications which he must have, he must know how to read and analyse the financial accounts and statements. It is obvious from what I have set out that these qualities will be absent in the daily retailers and they cannot be the persons from whose standpoint we judge the materiality of the information.

However, the investor who possesses general professional knowledge need not have the knowledge that Neoh had, for example, in relation to his specific researches on the pricing efficiency of the Malaysia stock market for the period from 1968 to 1983 for his thesis for a doctoral degree – "An Examination of the Efficiency of the Malaysian Stock Market" – which involved finding

out how accurately the share prices reflect the currently available information on the share. The information so obtained was through specific researches and such information unless published an investor with general professional knowledge would not be expected to have.

The lower court – despite the contention that Chua knew the stock figure should be millions higher, that he was optimistic of increased production because of the installations of additional machinery, that he did not know the stock figure or gross profit margin and would have to work on the basis of historical profit margin and it was more difficult for him in getting the profitability in May and June 1995 because of the absence of the accounts of Seremban and Shanghai subsidiaries – found the information as to the declining profit conveyed by the January to April 1995 management accounts to be specific confidential information. However, the lower court went on to decide that the information would not affect materially the price of the shares of KHI. This is what the lower court said in this respect:

> [Page 533.] Since the Accused had only January to April 1995 monthly management account at the time of the two charged sales, we should ask how much reduction in operating profit would be gauge by looking at the accounts before him, taking into account his high expectation of increased production, sales and profit and the factors stated in Note 8 of the Ex. P77. As I had said earlier, while it would indicate a decline in the operating profit, we do not know the extent of that decline. Is the decline to be so material that in the words of PW29: is going to affect the perception of the public regarding the value of the shares?' Or will the decline be insignificant that the investing public would just regard it as normal rise and fall in the ordinary course of business.
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> ...
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> [Page 535]. There is a weakness in PW29's evidence in two aspects that restrained me from accepting his opinion on how material the price sensitivity of the half year results was in fact in this case. Firstly, he was dealing with the whole six months monthly management account from January to June 1995 assuming that all the figures therein were correct. The evidence unfolded before the court revealed that the Accused did not have any more than April 1995 monthly management account when he effected the two charged sales and he knew that the stock figures in the account was unreliable. Secondly, as regard the decline in KHI share price in the first period (2 May 3 July 1995) and the second period (3 July to 27 September 1995), PW29 advanced three possibilities. It is to be noted that P.W.29 did not mention the possible effect the 1994 year result might have on the share price. This is to my mind an important omission in that he had earlier said that the length taken by the market to digest a announcement would be half a year. One would also think that full year result would be more important that the interim result. In our

> case the 1994 full year result which reported a 10% increase in profit was announced on 9 May 1995. Could it be a contributing factor to the consistent decline of price in KHI share from May to the middle of November 1995? If we were to follow PW29's view that it would take the market 6 months to digest the announcement, the effect of the 1994 full year result cannot be overlooked. It should be noted that PW29 study was based on the whole 6 months period. We did not hear from him whether, taking the January to April 1995 alone, would he have found information i.e. decline in operating profit is price sensitive information which would materially affect the price of KHI share is made know to the investing public.

The part of the judgment at p. 533 would certainly indicate that the lower court had looked at the matter of the information conveyed by the January to April 1995 management accounts from the view point of Chua rather than that of a reasonable investor who possessed general professional knowledge. This means that the question of materiality had been looked at subjectively when the question was posed as to what the accounts would present to Chua rather than to the reasonable investor who possessed general professional knowledge. That in my view is a misdirection on the part of the lower court. However, it must nevertheless be shown, applying the test in *Basic v. Levinson*, that the indicated decline in profit will probably occur and that it is of a sufficient magnitude compared to the totality of the company's activity. What the said accounts would show is a substantial decline in the profit month on month which is significant considering the fact that the totality of the company's activities is the manufacture and sale of various tiles where profit is all important and a major source of the company's income. Ch'ng Boon Huat, a corporate analyst of the KLSE testified that the price of shares is affected by unexpected financial results. He also said that the profits of the KHI group show a decline of RM9.4 million when the period ending April 1995 (showing a profit of RM3.1 million), is compared to the corresponding period of 1994 (showing a profit of RM12.5 million) which is 75% lower and that this information will affect the price of KHI. Therefore, when the lower court concluded in the way it did at p. 535, *supra*, it failed to take into account the evidence of Ch'ng Boon Huat. The evidence which I have narrated definitely shows a very drastic decline in profit and it can be anything but expected.

Mr. Richter QC had likened the prosecution case to the following illustration (to quote him):

> Put the case of a Managing Director who receives a set of monthly accounts which tell him that there has been a 50% drop in profits. At the same time, he receives a separate report from the finance manager saying "a major adjustment will have to be made to these interim unaudited accounts because when proper adjustment is made for the stock position which is as yet unascertained, it will be seen that there has not been any decline in operating profits but rather, if anything, an increase.

In fact a different illustration was put forth to the lower court, that is the arrival of a shipment of gold, and which I have already referred to earlier when I was considering the question of whether the accounts show a decline in the operating profits of KHI group of companies. What I have said there applies to the present illustration. All the matters (the increased production, the contribution from other companies, the stock adjustment and Chua's optimism) do not in the remotest way go towards showing that there will be a profit which the illustration is premised on and upon which Mr. Richter QC's argument is founded. I cannot see how the monthly management accounts can be likened to totally false information or information which is subject to the possibility of there being an increase in the profit rather than a decline. The management accounts by the fact that they were regularly produced and delivered to Chua would per force militate against such accounts being totally useless as I cannot imagine any finance manager of a public listed company such as Foo doing such a stupid thing as churning out useless management accounts month after month. There is no suggestion that Foo was stupid nor is there any suggestion or evidence to suggest that those management accounts did not serve the purpose for which they were printed. As for the argument that after adjustment those management accounts may actually show an increase in the profit, there is nothing in the way of tangible evidence to support such a possibility. It must not be forgotten that the figures show a decline of RM9.4 million in profit which means that there must be evidence to suggest a turn around involving more than RM9.4 million; there is absolutely no evidence to remotely support such a probability. Therefore, the probability exists that there will be an unexpected or drastic decline in the operating profits of the KHI group of companies as indicated in those management accounts. Any investor who possesses general professional knowledge would be able to know that by reading the said management accounts. The test of materiality has therefore been satisfied. I turn now to the issue of whether Chua made improper use of the information.

Whether Chua Made Improper Use Of Information

The prosecution's contention is that once the prosecution had proved Chua was in possession of price-sensitive information and that Chua traded in the securities of KHI, then s. 106 of the Evidence Act 1950 comes into play to cast upon Chua the burden of showing that he did not make improper use of the information, relying on *Green v. Charterhouse Group Canada Ltd et. al.* 68 DLR (3d) 592. That, in my view, is not a correct statement of the law as expounded in *Green v. Charterhouse Group Canada Ltd et. al*. The law requires more from the prosecution instead of just merely proving the existence of the price-sensitive information and the sales of the shares. The prosecution must additionally prove that the information was a factor in the decision of

Chua to sell the shares. This is in fact what *Green v. Charterhouse Group Canada Ltd et. al.* decided. That Canadian case involves interpretation of s. 113(1) of the Securities Act 1966 (Ont) which reads:

> 113.(1) Every insider of a corporation or associate or affiliate of such insider, who, in connection with a transaction relating to the capital securities of the corporation, makes use of any specific confidential information for his own benefit or advantage that, if generally known, might reasonably be expected to affect materially the value of such securities, is liable to compensate any person or company for any direct loss suffered by such person or company as a result of such transaction, unless such information was known or ought reasonably to have been known to such person or company at the time of such transaction, and is also accountable to the corporation for any direct benefit or advantage received or receivable by such insider, associate or affiliate, as the case may be, as a result of such transaction.

In that case, the plaintiff shareholder entered into an agreement with other shareholders for the sale to them of shares the price of which the plaintiff thought would decline and the other shareholders accepted the offer of the plaintiff in order to avoid the release of the shares of the plaintiff onto the market. Shortly before the sale, the other shareholders knew of a take-over possibility of the company under which an offer might be made for the shares at a substantially higher price than that agreed by the plaintiff. The plaintiff was notified in general terms of the possibility of an offer being made at a price higher than the market price. The price did rise after the take-over materialised. The plaintiff was, before the sale, also aware that the company had a net profit increase of 79% and gross sales increase of 27% for the first quarter of 1968. The plaintiff claimed, among others, under s. 113(1) but failed. What is relevant is the following passages of the Ontario Court of Appeal, at p. 618-619, *viz*.:

> The heart of the s. 113 issue is whether the defendants or some of them "made use of" specific confidential information for his or their own benefit or advantage. The issue is illustrated by the opposing arguments. Mr. Weir submits that if an insider has the information, and makes a purchase of shares from a shareholder who does not have the information, s. 113 at once comes into play, without more. The argument of the defendants was that it is not enough to have the information. To "make use of" it, they submit, the information must be a "factor" in the insider's participation in the transaction which the insider carries out with the person alleged to be aggrieved, "either by inducing him to enter into it or by assisting him or otherwise influencing him in the manner in which he performs it" (the quotation is from Mr. Genest's factum).
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> The trial judge accepted this argument but attached to it a proviso that once it is proven that an insider had specific confidential information, and had bought shares from a shareholder who did not have such information, an "onus of

explanation" devolves upon the insider to establish that he did not make use of the information.

I would also accept the proposition that a plaintiff invoking s. 113 must show that there was specific confidential information, which the insider had, and that it was a factor (in the sense stated) in the action the insider took whereby the plaintiff suffered loss. The proviso or corollary I would link to this principle is that once it is shown that the insider had such information, and entered into a transaction involving the purchase of shares of a shareholder who did not have it, the burden of proof is thereafter upon the insider to show that in fact he did not make use of the information in the transaction, that is, that the information was not a factor in what he did. This is more than an "onus of explanation"; it is a burden of proof that rests on the insider to the end of the case. It is of course one that is satisfied by a preponderance of credible evidence, on a balance of probabilities – the standard burden of proof in civil cases.

The statement of law of the Court of Appeal in the above passage should, in my view, be accepted as stating the legal position in Malaysia in relation to an offence under s. 89. Therefore, the prosecution must, in addition to establishing the ingredients of the specific confidential information which if generally known to the public would materially affect the price of the shares, also establish that the information was a factor which resulted in Chua's decision to sell the shares. Learned counsel for the defence argued that *Green v. Charterhouse Group Canada Ltd et. al.* is a civil case and the passage quoted is *obiter dictum*. Since that case is in any event not binding authority, it matters not whether what was said was *obiter dictum* or not. However, I find the general statement of law there to be applicable as a matter of construction of s. 89 and not because that case is binding on me.

Since we cannot look into the mind of Chua and since there was no direct evidence that the sales were induced by the information, the circumstances surrounding the sale of the shares will have to look at to determine whether it can be inferred that the price-sensitive information was a factor in the sale of the shares. That inference or circumstantial evidence can be relied on is a proposition of settled law and I do not think that is seriously disputed by the defence since they referred to and relied on cases which support that proposition of law, *viz.*, *CCA v. Green* [1978] VR 505; *Caswell v. Powell Duffryn Associated Collieries Ltd.* [1940] AC 152. But the defence seems to be equivocal because it had submitted in the following terms:

... The test for whether one has used something is dependent upon proof of whether the person had it and knew what he had so he **could and did as a factual matter** use it – ie, the person must know what he has before he can meaningfully be said to use it. There must be some casual link between the possession of the information and its use in the context of a penal provisions

> requiring *men rea* such as ss. 89 and 90 of the Act. There must be actual not constructive or imputed use. On the other hand, once **actual use** is established, the question whether it was "improper" is, on the authorities, to be ascertained objectively according to the standards of propriety of a reasonable Managing Director in the Respondent's shoes.

For that proposition learned counsel for the defence had cited *CCA v. Green*, 505. 512, 513, 514-15; *Chew v. R* [1992] 7 ACSR 481, 491; *R v. Yuill* [1994] ACSR 95, 112; *R v. Byrnes* [1995] 17 ACSR 551, 559-561 and *R v. Towey* [1996] 21 ACSR 46. I am not sure what learned counsel meant when it was submitted that: "There must be actual not constructive or implied use." *CCA v. Green* did not use those terms and therefore cannot be an authority to support that proposition. As I have said earlier, use of information is a matter of the mind which we cannot look into, unlike use of a car which we can see. The use can only be determined by inference or circumstantial evidence and if by the use of the term "actual not constructive or implied use" it is meant to say that an inference cannot be drawn as regards use, then that proposition is contrary to what *CCA v. Green* had decided and which I have earlier referred to. As for the other cases they are concerned with the question of "improper use" rather than use. Therefore, I will consider them when I go into the question of whether there was "improper use". But first, to the question of whether Chua had used the information.

For the purpose of deciding this question, more of the facts of this case have to be narrated. On 8 June 1994 KHM passed the following resolution to sell KHI shares:

> AUTHORITY FOR THE DISPOSAL OF KIM HIN INDUSTRY BERHAD'S SHARES
>
> In view of the Company's increasing financial needs in diversification program in property industry, it was resolved that authority be and is hereby given to Mr. Chua Seng Huat, a director of the Company to implement the disposal of 15% of the Company's investments in Kim Hin Industry Berhad at the best price as he may deem fit or expedient in the interest of the Company and such authority shall remain in force unless revoke by members' resolution.

This resolution is relied on by the defence as giving Chua the authority for the sale of the two sales that occurred subsequently and as giving it propriety. At this time KHM had 50,438,500 shares in KHI. There were sales of 2,140,000 from 24 June to 22 August 1994 and another 5,365,000 shares between 23 May and 29 August 1995. The following table sets out the details of the sales:

NO.	DATE	NO OF SHARES SOLD	BROKERS	PRICE
1. *	24/06/94 to 22/08/94	2,140,000	Various Malaysia resident brokers	Above 13.00 to 14.82
2. *	23/05/95	1,000,000	Sarawak Securities	11.10
3.	23/05/95	41,000	Crosby Securities	
4.	30/05/95	100,000	Sanyo Merchant Bank	11.50
5.	08/06/95	200,000	Summit Securities	12.00
6.	21/06/95	100,000	Crosby Securities	11.60
7. *	26/06/95	200,000	Sarawak Securities	11.41
8.	07/07/95	175,000	Crosby Securities	11.20
9.	18/07/95	100,000	Crosby Securities	10.30
10.	19/07/95	300,000	RHB-Cathay	10.12
11.	21/07/95	300,000	RHB-Cathay	10.325
12.	27/07/95	250,000	Crosby Securities	9.9658
13.	31/07/95	150,000	UBS	9.715
14.	01/08/95	472,000	UBS	9.931
15.	01/08/95	125,000	UBS	9.708
16.	01/08/95	378,000	UBS	9.356
17.	02/08/95	15,000	UBS	9.408
18.	02/08/95	350,000	UBS	9.507
19.	03/08/95	109,000	UBS	9.466
20. *	29/08/95	1,000,000	Arab-Malaysian Sec	8.997

The shares transacted by the brokers Sanyo Merchant Bank, Crosby Securities and RHB-Cathay were through the use of the name of Nancy Chong, the personal assistant of Chua and Chua was instrumental in that. Chua proferred

the excuse to Nancy Chong that unless her name was used it would take time to open those accounts which, as the evidence shows, was not true because other accounts were opened on the very day of the sales of shares, for example the transaction enumerated in row 2. The sales in rows 1, 2, 7 and 20 were done in Malaysia while the others were done overseas.

In respect of the two sales through Sarawak Securities, evidence was given by Gerald Jabu a dealer of Sarawak Securities that Chua was a reluctant seller. These sales were transacted by Gerald Jabu after his superior Benny Ng had given him the instructions to contact Chua and after Benny Ng and Chua had agreed on the price. These two sales form the subject-matter of the two charges (principal and alternative). Such evidence appears to have been relied on by the lower court as preventing any inference being drawn that Chua made use of the information but rather that the sales were initiated by Benny Ng. The lower court after accepting the fact that the sales were initiated by Benny Ng, went on to say:

> It is my view that the prosecution should call Benny Ng to shed light on how the transaction came about whether in the result the testimony is for or against the case for the prosecution. By failing to call Benny Ng and if the Accused were to remain silent hereafter, the court would be left with a lingering doubt as to whether indeed the Accused had made improper use of the insider information when he sold the KHI shares on 23 May and 26 June 1995.

The lower court then concluded that it was not proved that Chua had made improper use of the information without giving any reason for rejecting the argument of the prosecution concerning the evidence though she recited in full those arguments which arguments I will refer to later. It can be said straightaway that the lower court did not elaborate how the absence of testimony from Benny Ng could cause a "lingering doubt" as to whether Chua had made improper use of the information. What evidence could Benny Ng give that we do not already have was not stated by the lower court. Unless you can point to the evidence of Benny Ng as being able to create a doubt, I cannot see how such a conclusion as drawn by the lower court can be made. The lower court did not consider the matters urged by the prosecution which I am going to refer to next.

It was correctly pointed out by the prosecution that the overseas transactions have their advantage because in the case of married transactions done in Malaysia, that is where "a sale is matched by a buy" of the shares whether done through the same broker or by different brokers, it must be reported to the KLSE as soon as possible on the same day or by 9.30am the next day if the transaction took place after 5.15pm. This requirement results in information of the transaction being disseminated through the computer system to brokers located in Malaysia who are all linked to the computer system providing such

information. In the case of sales transacted overseas by overseas brokers, the brokers are not bound by this reporting rule and so the brokers in Malaysia will not be aware of those transactions until much later. The overseas sales, as shown in the table, supra, accounted for 3,165,000 shares and news of such sales would have put selling pressure on KHI shares and that would in turn drive the price down.

The interim financial results of KHI covering the period from January to June 1995 were announced on 26 September 1995 on which date the price of KHI was RM7.25 and the price thereafter went to a low of RM3.96 on November 14. This proves the point Neoh was making that a drastic drop in the earning of the company would influence an investor. The results, as mentioned earlier, showed a decline in profit of 51.17% when compared to the corresponding period of 1994.

The defence contended that the evidence which I have just referred to is not sufficient to establish that Chua had used the information, relying on *CCA v. Green.* That case concerned a charge that an officer of a corporation did make improper use of information acquired by him by virtue of his position as such officer to gain directly an advantage for another person. The accused was a director of two companies, which I will call A and B. The accused was present at a meeting of company A where the possibility of making a call on shares was discussed but with no decision taken. Less than a month later, on Feb 12, 13, 14 and 25 company B sold 100,000 shares of company A which decision the accused was responsible for. The only evidence explaining the sales was a statement of the accused that company B had given financial assistance to another company and for that reason had been forced to obtain funds by selling the shares. Company B still had 80,000 shares in company A. The court there approved of the following passage of Dixon, J in *Martin v. Osborne* [1936] 55 CLR 367, at 375, *viz.*:

> If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability for the occurrence of the fact to be proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed.

The court there went on, at p. 514-515, to say:

> Something more, then, must be established than the mere sequence, in point of time, of the gaining of the information and of the sale. The mere occurrence of the two events in sequence one to another does not establish the causation. In the absence of other evidence the inference of causation is at best an

inference of equal degree of probability with the inference that the two events are not causally connected. Such evidence as there is concerning the sale is equivocal.

Learned counsel for the defence then contended that the sales in the present case, just as in *CCA v. Green*, are equivocal in that the sales could be due to the resolution authorising Chua to sell though it is open to the inference that the information may have played a part and the prosecution had, therefore, failed to prove that Chua had made use of the information. The validity of that contention would very much depend on whether the facts of the present case are similar to *CCA v. Green*. The sales in *CCA v. Green* came less than a month after the possibility of making a call on shares was discussed. The sales in the present case, for which Chua is charged, were done on 23 May and 26 June 1995 which is more than eleven months and twelve months respectively of the resolution of 8 June 1994. Surely then, if the resolution was the possible cause of the two sales one would not expect the sales to have taken place so long after the passing of the resolution especially when more cash was required. If the sales that took place between 24 June and 22 August 1994 fall to be considered, then I would agree that those sales could possibly be due to the resolution rather than price-sensitive information assuming there is such information at that time because the sales came close to the passing of the resolution. That 2,140,000 shares were sold during the period of 24 June to 28 August 1994 is indicative of the urgency to sell the shares to raise cash. Conversely, where sales proximate to the date of the resolution did not thereafter take place, this would mean that the urgency to sell was no longer present and, therefore, the further removed any sale of shares from the date of the resolution would mean that it was not dictated by the urgency to raise money that was stated in the resolution but by some other reason. Since the sales concerned were eleven and twelve months from the resolution, it can be concluded that the sales were not dictated or motivated by the resolution though the authority to sell rested on that resolution. That the two sales came so soon after it became apparent to Chua that KHI group of companies would suffer a significant decline in operating profit justifies the inference that it was for that reason that the two sales were made. The case is made stronger by the use of Nancy Chong to trade the shares. The case is made even stronger by the rapid and numerous sales thereafter and just before the official announcement of the financial results on 26 September which brought about a plunge in the price. This means Chua had made use of the price-sensitive information unless there are other evidence that prevents such an inference from being drawn. At this stage of the case there is, after discounting the resolution, nothing to prevent that inference from being drawn because there is no evidence to show otherwise than that the sales were the result of the price-sensitive information. What about the fact of Chua's knowledge of the inaccurate stock figures, Chua's optimism about the

contribution of the Shanghai and Seremban companies and increased production? Could that throw a doubt on whether Chua had made use of the information? The answer to the question depends on whether he really honestly held that optimism and this in turn depends on whether the correct stock figures, the contribution of the two companies and the increased production could turn the KHI group of companies from a decline in profit of 78.242% (for the period ending in April, from RM12,551,514.14 in 1994 to RM2,731,774.68 in 1995), erroneous it may be, or from a decline of 48.1%, after a correction of the stock figure, into an increase in profit. This in turn turns on the question of what material Chua had upon which he based his estimation of the correct stock figure and which he based his optimism on because as events turned out and as the evidence shows, there was no basis at all for such an optimism or for that matter. This means there is as yet at the prosecution stage of the case nothing of substance other than unsubstantiated belief and optimism which Chua had fastened on to say there would be no decline or no drastic decline in the operating profit. Chua may have other stock figures or the figures of contributions from the two companies or of the increased production that may throw a different light on the case but those figures remain locked in his mind and until they are revealed they cannot be said to cast any doubt that Chua had used the information because whatever evidence that had been produced cannot justify the optimism or belief that there would be no decline or no drastic decline in the operating profit.

I turn now to the question of whether the use was "improper". The defence contended that the question of whether the use was improper is to be ascertained objectively according to the standards of propriety of a reasonable managing director in the position of Chua. Various cases were cited, including *CCA v. Green* which I have dealt with earlier but which does not deal with the question of "improper use". The next case referred to is *Chew v. R*, it dealt with s. 229(4) of the Western Australia Companies Act which prohibited an officer of a corporation from making improper use of his position to gain an advantage for himself or another or to cause detriment to the corporation. There it was held that it is necessary to establish not merely that the accused intended that a result should ensure but also that the accused believed that the intended result would be an advantage for himself or someone else or a detriment to the corporation. It was also held that the accused's state of mind is relevant not only to the requirement of purpose but also to the element of improper use of his or her position. *Chew v. R* was considered and clarified in *R v. Yuill* [1994] 15 ACSR 95 where it is held (1) that while the accused's state of mind is relevant to the element of improper use of position it is not relevant in every case, (2) that therefore it was not necessary for the Crown to prove that the accused was aware of the improper nature of the use and (3) that the state of mind of the accused only becomes relevant where the

Crown has not established on an objective basis that the use was improper. The court there, at p. 113, said this:

> There may be some cases where the use made by the accused of his position is so inevitable and unarguably improper from a purely objective standard that no issue as to his state of mind will (or perhaps even could) arise for the jury's determination, but we believe such cases will be unusual. In most cases it will be necessary to give those directions.

Here again, I am of the view the statements of law stated by *R v. Yuill, supra,* reflect the legal position in Malaysia with regard to the term "improper use" in ss. 89 and 90 of the Act. But it must be recognised that case is in respect of use of position and not concerned with the use of information. This distinction is important because, in my view, while it is necessary to call evidence with regard to what a managing director in the position of Chua would or would not do if Chua had been charged with the improper use of his position, such evidence is not necessary in cases involving improper use of information like charges under s. 89 or s. 90 of the Act. What is improper use of position depends upon whether there is a breach of standard of conduct that would be expected of a person in similar position whereas what is improper use of information under ss. 89 and 90 depends not on what managing directors in similar position would do but is to be measured by whether such use is prohibited by law.

It was argued that it may amount to a breach of duty as managing director of KHM for Chua not to have sold when asked by Sarawak Securities, which can be dismissed by saying that no duty can be imposed on a managing director that requires him to break the law, that is to require him to trade taking advantage of unpublished price-sensitive information. To accept that argument of the defence would mean to accept the position that Chua's duty to sell is above his statutory duty not to sell when possessed of price-sensitive information even though it breaks the law; such a proposition is too absurd and obviously untenable as to merit any further discussion. It is so obviously improper to have sold the shares when possessed of unpublished price-sensitive information that the state of mind of Chua in this regard is irrelevant though it is relevant with regards to the question of whether he had used the information. It was suggested that evidence should have been led as to what a managing director in the position of Chua would or would not do so as to enable the court to judge objectively whether what Chua did was improper or otherwise. What evidence do we expect from such a person? Could one imagine or accept any evidence supporting the proposition or practice that allows a managing director to do what the law does not permit. Surely not. Can you imagine the court allowing such a defence as this: "I am bound by the resolution to sell and to time the sale the best way I can as to bring the maximum profit to the company. I do not know that is trading on unpublished

price-sensitive information nor that it was against the law." That would be pleading ignorance of the law as a defence. Therefore, I see no purpose in the introduction of evidence, and that is the only evidence that will be acceptable, to say that a managing director should not trade on unpublished price-sensitive information which the law already states he cannot do. In this regard it must be appreciated that a case like *R v. Byrnes* which held that impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offence by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case has no relevance to the present case because that case concerned the improper use of position whereas the present case concerns the improper use of information. The same can be said of *R v. Towey.*

The defence also contended that the fact that no more shares than what was sold throw a doubt on the case. That proposition is just like saying that a thief who did not empty the bank vault completely cannot be a thief, which is so absurd that it only needs to be stated to be put to rest. There was another proposition of the defence which was contended to cast a doubt on the case and that is that the absence of a buy-back scheme of the shares. It must be remembered that it is not the prosecution case that there was a scheme to manipulate prices so that sales and purchases can be made by Chua with a view to profit. The prosecution case is simply one of trading on unpublished price-sensitive information. The absence of a buy-back scheme means nothing. There is, also, no merit in that proposition of the defence. Therefore, the prosecution had proved beyond reasonable doubt that there was improper use of the price-sensitive information by Chua. I turn now to the last question of gaining an advantage.

Whether It Was To Gain, Directly Or Indirectly An Advantage

This question should not detain us long because if the two sales of shares had taken place after the release of the financial results on 26 September the price fetched would be around RM6.70 instead of RM11.10 and RM11.41 respectively which are the prices which the two sales fetched. There was clearly an advantage gained for KHM.

Conclusion

In the premises, I allow the appeal. The prosecution has made out a case beyond reasonable doubt on all the principal or alternative charges which Chua has to answer. The acquittal of Chua by the lower court is set aside and in its place an order is made that Chua be called upon to enter on his defence on the charges.